# PUNJ LLOYD OIL & GAS (MALAYSIA) SDN BHD v. ETIQA INSURANCE BHD & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-1037-06-2014]
1 MARCH 2016

***CIVIL PROCEDURE:*** *Adjournment – Adjournment without liberty to file afresh – Grounds for – Whether abuse of process to allow plaintiff liberty to file afresh – Whether trial judge exercised discretion reasonably – Whether decision based on relevant considerations and established principles – Whether decision justified – Rules of Court 2012, O. 21 rr. 2(1), 3(1) & O. 35 r. 3*

Petronas Carigali Sdn Bhd awarded a project to construct the Sabah-Sarawak Pipeline project to a consortium called Punj Llyod-Dialog-Petronas Consortium of which the appellant was one of the members. The respondents had agreed to insure the consortium (including the appellant) for the project against any physical loss, damage, liability or expense from the period of 6 March 2008 until 6 August 2011 under a construction all risks policy. One aspect of the project involved drilling and construction of borehole for the purpose of crossing of the pipelines across the Mengalong River. Due to heavy rain, Section 1 of the project was hit by severe floods causing damage to the borehole and gravel access road at the Mengalong River crossing and the right of way at various locations and access roads in the area. The appellant submitted its claim to the respondents pursuant to the insurance policy but the claim was rejected by the respondents. The appellant thus filed a writ and statement of claim against the respondents. During trial, the hearing was adjourned for the failure of the appellant to secure the attendance of its second witness in court. On the subsequent date, when the second witness was still unable to attend court, the appellant requested for another adjournment and that the court vacate the dates fixed for trial. However, the request for adjournment was refused by the court. Thereafter, the appellant informed the court that it would withdraw its claim but with liberty to file afresh. However, the trial judge allowed the appellant's withdrawal of the suit without liberty to file afresh on the ground that it was an abuse of process and 'to allow the plaintiff liberty to file afresh was to give the plaintiff a second bite of the cherry' and that it 'would be an injustice' to the respondents. Hence, the appeal by the appellant.

**Held (dismissing appeal with costs)**

**Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:**

**(1)** The decision to struck off the suit or claim without liberty to file afresh upon withdrawal of the suit by the appellant is an exercise of discretion by the judge. Under O. 21 of the Rules of Court 2012 ('ROC'), a writ

action may be discontinued or withdrawn without the leave of the court against any or all defendants at any time not later than 14 days after the service of the last defence. In the present case, the trial had proceeded and thus, O. 21 r. 2(1) of the ROC was no longer applicable. The relevant rule was O. 21 r. 3(1) of the ROC where leave of court was required. In hearing an application to withdraw, the court may grant leave with or without conditions. (paras 14 & 15)

**(2)** Under O. 35 r. 3 of the ROC, the trial judge has a wide discretion to grant adjournment of a case from time to time. However, the discretion must be exercised reasonably by taking into account relevant considerations and guided by established principles. In the instant case, the trial judge had taken into account the fact that the appellant had commenced the case against the respondents in 2013. The trial judge also noted that the appellant's second witness was in India and was no longer in the service of the appellant and therefore doubted the speed or urgency that the appellant could exercise to secure the attendance of the said witness in court. (paras 23 & 24)

**(3)** The trial judge had already indulged the appellant with one adjournment to secure the attendance of the second witness. In view of the amount claimed against the respondents, it was reasonable to say that the claim was important to the appellant because if it failed then the appellant stood to absorb the huge costs of the damage caused by the floodwater. It was not cited anywhere in the submission or the judgment of the court the reason why the second witness, the appellant's manager at the site and an important witness for the appellant, could not attend court. On the facts and circumstances of this case, the trial judge's decision was justified. (para 25)

***Bahasa Malaysia*** *Headnotes*

Petronas Carigali Sdn Bhd diawardkan satu projek pembinaan Saluran Paip Sabah-Sarawak kepada sebuah konsortium yang dikenali sebagai Punj Llyod-Dialog-Petronas Consortium di mana perayu adalah salah satu ahlinya. Responden-responden bersetuju menginsuranskan konsortium (termasuk perayu) bagi projek tersebut terhadap apa-apa kerugian fizikal, kerosakan, liabiliti atau perbelanjaan bagi tempoh dari 6 Mac 2008 sehingga 6 Ogos 2011 di bawah polisi semua risiko pembinaan. Salah satu aspek projek tersebut melibatkan penggerudian dan pembinaan lubang gerek bagi tujuan lintasan saluran paip merentasi Sungai Mengalong. Akibat hujan lebat, Seksyen 1 projek tersebut mengalami banjir besar yang menyebabkan kerosakan kepada lubang gerek dan jalan kerikil di rentasan Sungai Mengalong serta hak laluan di beberapa lokasi dan jalan masuk ke kawasan tersebut. Perayu mengemukakan tuntutannya kepada responden-responden menurut polisi insurans tersebut tetapi tuntutan tersebut ditolak oleh responden-responden. Oleh itu, perayu memfailkan writ dan penyataan

tuntutan terhadap responden-responden. Semasa perbicaraan, perbicaraan ditangguhkan atas kegagalan perayu mengemukakan saksi keduanya di mahkamah. Pada tarikh yang berikutnya, apabila saksi kedua tersebut masih tidak boleh hadir ke mahkamah, perayu meminta satu lagi penangguhan dan bahawa mahkamah membatalkan tarikh yang ditetapkan bagi perbicaraan. Walau bagaimanapun, penangguhan yang dipohon ditolak oleh mahkamah. Perayu kemudian memaklumkan kepada mahkamah bahawa ia akan menarik balik tuntutannya tetapi dengan kebebasan untuk memfailkan semula. Tetapi, hakim bicara membenarkan penarikan balik guaman perayu tanpa kebebasan memfailkan semula atas alasan bahawa ia adalah salah guna proses mahkamah dan 'untuk membenarkan plaintif kebebasan memfailkan semula adalah bermaksud memberikan plaintif peluang kedua' dan ia 'membentuk ketidakadilan' kepada responden-responden. Oleh itu, rayuan oleh perayu.

**Diputuskan (menolak rayuan dengan kos)**

**Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:**

**(1)** Keputusan untuk membatalkan guaman atau tuntutan tanpa kebebasan memfailkan semula atas penarikan balik guaman oleh perayu adalah pelaksanaan budi bicara oleh hakim. Di bawah A. 21 Kaedah-Kaedah Mahkamah 2012 ('KKM'), tindakan writ boleh dihentikan atau ditarik balik tanpa kebenaran mahkamah terhadap mana-mana atau kesemua defendan pada bila-bila masa tidak kurang dari 14 hari selepas penyampaian pembelaan terakhir. Dalam kes ini, perbicaraan telah bermula dan oleh itu, A. 21 k. 2(1) KKM tidak lagi terpakai. Kaedah yang relevan adalah A. 21 k. 3(1) KKM di mana kebenaran mahkamah diperlukan. Dalam perbicaraan permohonan untuk penarikan balik, mahkamah boleh memberikan kebenaran dengan atau tanpa syarat.

**(2)** Di bawah A. 35 k. 3 KKM, hakim bicara mempunyai budi bicara yang luas untuk membenarkan penangguhan kes dari semasa ke semasa. Walau bagaimanapun, budi bicara tersebut mesti dilaksanakan secara munasabah dengan mengambil kira pertimbangan yang relevan dan berpandukan prinsip-prinsip matan. Dalam kes ini, hakim bicara telah mempertimbangkan fakta bahawa perayu memulakan kes terhadap responden-responden pada 2013. Hakim bicara juga mengambil kira bahawa saksi kedua perayu berada di India dan tidak lagi berkhidmat dengan perayu dan oleh itu meragui kelajuan dan kesegeraan di mana perayu boleh memastikan kehadiran saksi tersebut di mahkamah.

**(3)** Hakim bicara telah memberikan perayu satu penangguhan untuk memastikan kehadiran saksi kedua. Berdasarkan jumlah yang dituntut terhadap responden-responden, adalah munasabah bahawa tuntutan tersebut penting kepada perayu kerana jika ia gagal, maka perayu bertanggungan terhadap kos yang besar bagi kerosakan yang diakibatkan oleh banjir itu. Tiada di mana-mana dalam hujahan atau penghakiman

mahkamah yang menyatakan sebab mengapa saksi kedua, pengurus perayu di tapak dan saksi penting perayu, tidak boleh hadir di mahkamah. Atas fakta dan hal keadaan kes ini, keputusan hakim bicara adalah berjustifikasi.

**Case(s) referred to:**

*Fox v. Star Newspaper Co (1898) 1 QB 636* ***(refd)***

*Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC* ***(refd)***

*Lee Ah Ba v. Md Noor Ariffin & Anor [1990] 2 CLJ 420; [1990] 2 CLJ (Rep) 313 HC* ***(refd)***

*Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] CLJ (Rep) 187 FC* ***(refd)***

*Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA* ***(refd)***

*United Asian Bank Bhd v. Balakrishnan Thanakodi & Ors [1992] 1 CLJ 522; [1992] 3 CLJ (Rep) 742 HC* ***(refd)***

**Legislation referred to:**

Rules of Court 2012, O. 21 rr. 2(1), 3(1), (2), O. 35 r. 3

*For the appellant - Kamraj Nayagam (Adam Lee with him); M/s Kadir, Andri & Partners*
*For the respondent - Ivan Loo (Loshini Ramarmuty with him); M/s Skrine*

*[Editor's note: For the High Court judgment, please see Punj Lloyd Oil & Gas (Malaysia) v. Etiqa Insurance Bhd & Ors [2014] 1 LNS 1152 (affirmed).]*

*Reported by S Barathi*

## JUDGMENT

**Abdul Aziz Abdul Rahim JCA:**

**[1]** This is the appellant's appeal (plaintiff in the High Court) against the decision of the learned judge given on 4 July 2014 allowing the appellant's withdrawal of the suit against the respondents (defendants in the High Court) without liberty to file afresh. The main ground for the decision is that it is an abuse of process and 'to allow the plaintiff liberty to file afresh is to give the plaintiff a second bite of the cherry' and that it 'would be an injustice' to the defendants/respondents to give plaintiff/appellant a chance to file afresh.

**Background**

**[2]** The undisputed facts: Petronas Carigali Sdn Bhd had awarded a project to construct the Sabah-Sarawak Pipeline Project from Kimanis, Sabah to Bintulu, Sarawak to a consortium called Punj Lloyd-Dialog-Petronab Consortium of which the appellant was one of the members.

**[3]** One aspect of the project involved the drilling and construction of borehole for the purpose of crossing of the pipeline across the Mengalong River. Between 23 December 2010 and 27 December 2010 there was heavy rain at several locations of Section 1 of the project. Section 1 was hit by

A severe floods causing damage to the aforementioned borehole and gravel access road at Sungai Mengalong crossing and the right of way at various locations and access roads in that areas. Some of the access roads and rights of way were submerged in flood water.

B **[4]** The respondents had agreed to insure the consortium (including the appellant) for the project against any physical loss, damage, liability or expense from the period of 6 March 2008 until 6 August 2011 under a construction all risks policy. The limits of liability or sums insured was 100%.

C **[5]** Immediately after the event, on 28 December 2010 the appellant through the consortium notified Petronas of its intention to recover losses pursuant to the policy. Petronas was provided with a detailed report dated 19 December 2011 of the incident.

**[6]** The appellant submitted its claim to the respondents for the sum of D RM13.989 million pursuant to insurance policy. However, the respondents rejected the appellant's claim. It appears from the respondents' written submission that this rejection was because respondents' loss adjusters Cunningham Lindsey Adjusters (M) Sdn Bhd had concluded that the appellant was not entitled to the RM13,989,887 claimed or any amount at E all for the reasons contained in its preliminary report dated 8 July 2011 and final report dated 15 February 2012.

**[7]** On 21 June 2013 the appellant filed the writ and the statement of claim against the respondents. After all the preliminaries were completed, there was a case management on 5 December 2013 before the trial judge. On F that day the case was set down for trial, with agreement of all parties, on two sets of dates – (i) 28-30 April 2014 and (ii) 19-22 May 2014. In the meantime there were amendments to the pleadings by both sides. Anyway, the trial proceeded as scheduled.

**[8]** On 28 April 2014, the trial commenced and the trial judge heard G appellant/plaintiff's first witness. Appellant's first witness was Mr Froid Mannummal Paily (the appellant's contract manager) and he testified on 28 April 2014 and 29 April 2014. After PW1 had finished giving evidence for the appellant on 29 April 2013, the court was informed that the appellant's second witness by the name of Umang Srivastava was not H available in court. He was based and still in India but he is no longer in the employ of the appellant.

**[9]** The trial judge then adjourned the hearing of the case to 19 and 20 May 2014, and at the same time directed the appellant to provide confirmation as to whether Umang will be attending the trial on those two I dates.

**[10]** On 2 May 2014 Umang, the appellant's second witness confirmed that he would be available to attend trial on the next continuation date. Thereafter appellant's solicitor informed the court accordingly and proceeded to prepare the witness statement for Umang and had filed the same in court on 5 May 2014.

**[11]** However on 12 May 2014 Umang informed the appellant's solicitors that he is not able to attend court from 19 May 2014 to 22 May 2014. The appellant's solicitors then wrote to the court and requested for an adjournment and the trial dates fixed for 19 and 20 May 2014 to be vacated; and for new trial dates to be fixed for Umang to come and testify. But the request for adjournment was refused by the court.

**[12]** Thereafter by letter dated 15 May 2014 the appellant informed the court that it will withdraw the claim since Umang is unable to attend trial on 19 May 2014, but with liberty to file afresh. Learned counsel for the respondents objected to the withdrawal with liberty to file afresh. After hearing the parties on the withdrawal issue, the learned judge made the decision that is now being appeal against.

**[13]** In arriving at her decision the learned judge had considered the following:

> This suit was filed in June 2013. When the suit was filed the Plaintiff knew the importance of Umang as its main witness as he was the person who was on site as well as the person having knowledge of the Plaintiff's claim. If the Plaintiff is given with liberty to file afresh then the Plaintiff would be given a second bite of the cherry. This is a clear abuse of process of the Court as the cross-examination and re-examination of the Plaintiff's 1st witness has been completed. To allow the Plaintiff to file afresh against the Defendants would be an injustice. There is also no guarantee that Umang will be present at the trial. Therefore, based on the circumstances of the case and the reasons mentioned above the withdrawal of the action against the Defendants is allowed but without liberty to file afresh.

**Our Decision**

**[14]** The decision to strike off the suit or claim without liberty to file afresh upon withdrawal of the suit by the appellant was an exercise of discretion by the learned judge.

**[15]** Under O. 21 of the ROC 2012 a writ action may be discontinued or withdrawn without the leave of the court against any or all defendants at any time not later than 14 days after the service of the last defence (if there are more than one defendants) – see O. 21 r. 2(1). In our case the trial had commenced. Thus O. 21 r. 2(1) was no longer applicable. The relevant rule in the circumstances was O. 21 r. 3(1), where leave of court was required. In hearing an application to withdraw, the court may grant the leave with or without conditions. Order 21 r. 3(1) reads:

Discontinuance of action with leave (O. 21, r. 3)

> 3. (1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

**[16]** Order 21 r. 3(2) provides that application under this rule shall be made by a notice of application. There is no specific form of such notice that must be followed. In our view a simple letter to the court and the other party of an intention to withdraw would suffice.

**[17]** Be that as it may, in this case counsel for the appellant submitted that the learned judge's decision was 'extremely harsh and unfair'. He argued that to grant the adjournment requested would cause no prejudice to the respondents. He argued that it was wrong for the learned judge to hold that to allow the adjournment would have allowed the appellant 'a second bite of the cherry' because at the material point of time the only witness called by the appellant to testified was the appellant's site manager. He submitted that the application for adjournment was a genuine request as Umang, the appellant's second witness could not attend court. He further submitted that this court in its appellate capacity can review the exercise of the discretion by the learned judge if the order made resulted in injustice to one or the other of the parties to the suit – *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] CLJ (Rep) 187; [1984] 1 MLJ 107, 109 FC, *Lee Ah Ba v. Md Noor Ariffin & Anor* [1990] 2 CLJ 420; [1990] 2 CLJ (Rep) 313; [1990] 3 MLJ 169 HC.

**[18]** Learned counsel for the appellant referred to us several cases on the principles to be followed in exercising court discretion whether or not to allow adjournment with no liberty to file afresh. These principles are settled and the parties have no quarrel about it. We produce the excerpts from those cases referred to us that illustrate the principles:

**[19]** In *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370; [2002] 3 MLJ 155, Gopal Sri Ram JCA (as he then was) held at p. 377 (CLJ); p. 161 (MLJ) as follows:

> What comes across clearly from the authorities that they have referred to is the fact that a judge exercising his power under O. 21 r. 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.
>
> One of these guidelines is that if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is

at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v. Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet another guideline; which a judge ought to bear in mind is any interim of interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v. Mann* [2000] FCA 1680.

The upshot is that it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the outer parameters established by the guidelines to which we have referred.

**[20]** In the case of *United Asian Bank Bhd v. Balakrishnan Thanakodi & Ors* [1992] 1 CLJ 522; [1992] 3 CLJ (Rep) 742; [1992] 1 MLJ 587, VC George J (as he then was) at p. 744 (CLJ); p. 591 (MLJ) referred to the English Court of Appeal case of *Fox v. Star Newspaper Co* (1898) 1 QB 636 which laid down the following principle:

The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

**[21]** The High Court in *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684, also considered and laid down the principles in respect of discontinuance. Lim Beng Choon J, held at p. 693 that:

The principles that can be extracted from the aforementioned cases are that the Court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if:

(1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v. Brown & Root Ltd*;

(2) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence – see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 1 LNS 101 case;

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation – see *Covell Matthews & Partners v. French Wools Ltd.* case."

**[22]** Learned counsel for the respondents submitted that we should not intervene with the exercise of the learned judge's discretion. Firstly, he submitted to allow the adjournment would cause prejudice to the respondents because the respondents would be subject to 'continuing threat' of possible future litigations on the same subject matter especially in the circumstances that there was no assurance or guarantee by the appellant as to when the appellant's second witness Umang can attend court to testify. The appellant, learned counsel submitted should have been prepared with his case.

**[23]** In our view it is without doubt that under O. 35 r. 3 of the ROC 2012 the trial judge has a wide discretion to grant adjournment of a case from time to time. But it is not an unfettered discretion. The discretion must be exercised reasonably by taking into account relevant considerations only and guided by the established principles (as laid down in the cases above).

**[24]** In our instant appeal the learned judge had taken into account the fact that the appellant had commenced the case against the respondents in 2013. The appellant was aware that some of its witnesses could be from India. So the learned judge was of the view that the appellant should be prepared. Moreover the learned judge noted that the appellant's second witness Umang was in India and is no longer in the service of the appellant. Thus the learned judge had doubts as to the speed or urgency with which the appellant could secure the attendance of the said witness in court.

**[25]** As to the contention that the decision was harsh and unfair, we are of the view that on the facts and circumstances of this case the decision was justified. In fact the learned judge had already indulged the appellant with one adjournment to secure the attendance of the second witness. In view of the amount claimed against the respondents it is reasonable for us to say that the claim was definitely of importance to the appellant. Should their claim fail the appellant stood to absorb the cost of the damage caused by the floodwater to the tune of RM13.9 millions which is a huge sum and could cripple a company cash flow. We also observe that nowhere in the submission or the judgment of the court was the reason why Umang, the second witness, could not attend court stated. We can only infer that no such reason or explanation was advanced or proffered to the court by the appellant. The second witness was important to the appellant. The second witness was the appellant's manager at site for the project.

**[26]** In the circumstances, we are of the view that the learned judge had judicially and properly exercised her discretion. Accordingly, the appeal was dismissed with agreed costs of RM10,000 to the respondents and the deposit ordered to be refunded.